Book Review

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BOOK REVIEW

IMPROVING AMERICAN JUSTICE BY LOOKING AT THE WORLD

A REVIEW OF CRIMINAL PROCEDURE: A WORLDWIDE STUDY EDITED BY CRAIG M. BRADLEY

GEORGE C. THOMAS III

The study of criminal procedure in the United States has long been quite insular. We seem to assume that we have the best system of justice, and it rarely occurs to scholars or judges even to wonder what other countries are doing. Many criminal procedure issues provoke heated discussion in this country. We argue about whether the Fourth Amendment exclusionary rule is a good idea or whether the Terry v. Ohio stop and frisk doctrine is good policy. We worry about whether indigent defendants receive effective assistance of counsel and, as one consequence, whether innocent defendants are convicted. We


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argue about victims’ rights and about the *Miranda v. Arizona* approach to regulating police interrogation. But what is notably missing from the debate, in most cases, is an understanding of the approach of other countries to these problems.

There are notable exceptions, of course—the path-breaking work of John Langbein, Mirjan Damaska, Abraham Goldstein, Martin Marcus, and Lloyd Weinreb provided a solid beginning for a corpus of comparative law in the criminal procedure context. Subsequent scholars have, for the most part, failed to build on this solid base. Moreover, my completely unscientific sampling discloses that the Warren Court was more likely to use the law in other countries to justify its criminal procedure decisions than is the Rehnquist Court. For a sample of one, consider *Miranda*'s reliance on interrogation law in Scotland, Ceylon, England, and India to help justify its requirement of warnings and waiver. Rather than question the wisdom or utility of using the law from other countries to shape American law, Justice Harlan’s dissent took issue with the Court’s understanding of the laws of these countries. By engaging the substantive

of the right to counsel and the role of counsel are incoherent, or downright cynical); Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 243 (1997) (agreeing that current doctrine is dysfunctional); Bruce A. Green, *Lethal Fiction: The Meaning of “Counsel” in the Sixth Amendment*, 78 IOWA L. REV. 433 (1993) (concluding that, in death penalty cases, the Court has indulged in the “lethal fiction” that lawyers are universally competent to represent criminal defendants).


384 U.S. at 486-91.

Id. at 521-22 (Harlan, J., dissenting).
law on which the majority relied, Harlan’s dissent suggests broad agreement that comparative law is a useful tool.

But when time came, thirty-four years later, to reaffirm *Miranda*, not a single Justice on the Rehnquist Court mentioned the experience in other countries during the *Miranda* era. Bradley’s book makes clear that other countries (including Russia!) have developed similar rules about interrogation. A recent paper by Stephen Thaman concludes that much of Europe now provides broader protection for the suspect during police interrogation than does the United States.2 Given the Rehnquist Court’s view that “*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture,”2 it would have strengthened the argument to show that other countries had discovered the utility of similar rules. The experience in other countries is at least relevant. But the Court was silent on how the rest of the world regulated interrogation.

Bradley’s book is thus a welcome antidote to the recent insularity of the criminal procedure debate. The essays on the law of criminal procedure in twelve countries provide welcome detail, not only as to the formal law but often to law as it is practiced in the various countries. Professor Bradley explains the omission of Egypt, Japan, Poland, and Australia, and I wondered about the absence of Turkey and Greece. Are there influences from the Ottoman Empire and ancient Greece that make their modern law different from that in Europe? But it is difficult to argue with Spain, Italy, France, and Germany from the European continent, with England as the “mother” of the common law, with Canada from North America (along with the United States, of course), and with South Africa, China, Russia, and Israel as more exotic systems. The only choice that seemed a bit peculiar was Argentina. Why not Brazil? Or Mexico? Or all three? Mexico’s experience, as our southern neighbor, must be quite different from that of Argentina, both of which might be different from Brazil, a former colony of Portugal. To pick a

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12 *Dickerson*, 530 U.S. at 443 (citations omitted).
13 BRADLEY, *supra* note *, at xxiv.
single country from all of Latin and South America struck me as a little too focused on the Northern Hemisphere.

No selection could satisfy everyone, of course, and Bradley's book is a gold mine of perspectives. Imagine in one book a chance to compare France with Germany, the United States with Argentina, Spain with Italy and Argentina, England with Canada. The wealth of detail that is the virtue of the book forces the reviewer to make difficult choices about what to discuss. My methodology is to begin with a few comments on the book as a whole. The bulk of the essay then focuses on three areas of criminal procedure. First, when can the police detain and question a citizen on the street? Second, what is the standard for providing lawyers for indigent defendants and what attention is given to the question of whether counsel is effective? Third, how are criminal verdicts reviewed and can the prosecution appeal an acquittal? I seek by this selection to cover the criminal process from the earliest point at which the police typically come into contact with the suspect, to the use of defense lawyers to test the prosecution's case, to the appellate review of the criminal verdict.

Each of these aspects of the criminal process can tell us much about the values of the architects of the system. The rules governing the initial police intervention are a compromise between strong countervailing policies—permitting police to intervene early to stop or solve crime balanced against a genuine concern that unbounded discretion trenches too harshly on individual liberty. The right to counsel issue is important because how a system dispenses counsel to indigent defendants, and the standard of performance to which counsel are held, tells us much about the process-oriented values that the policy makers hold. The review of verdicts and whether the prosecution can appeal tells us how systems detect and correct errors and how the risk of error is allocated; here I think we can learn from the rest of the world.

I will conclude on the issue of police detaining suspects that the United States has moved closer to the rest of the world. Though the rules governing police-citizen contacts on the street are superficially different here than in most other countries, the United States Supreme Court has created sufficient flexibility that American police have almost as much discretion in practice to detain briefly and question those suspected of criminal activity as police in other countries. Just as the rest of the world set
the model for police-citizen encounters, we are setting the
model for appointed counsel. Having effective appointed coun-
sel is not as important in the other countries surveyed in Brad-
ley’s book as it is in the United States, but the world is moving
closer to our model on this issue.

The greatest disparity between the United States and the
other countries is the structure of the appellate process. In this
country, the appellate courts in criminal cases are largely lim-
ited to affirming the underlying conviction or reversing and
remanding for a new trial. Canada seems to follow that model
as well. But in all the other countries, to a greater or lesser de-
gree, the appellate courts rehear the case. By virtue of this
broader review, the appellate court can modify a conviction to
correct any errors and can change an acquittal to a conviction,
all without remanding for a new trial. While far from costless, a
prosecution appeal of an acquittal in this kind of system does
not deplete a defendant’s resources or prolong his anxiety to
the same extent as if a second trial might follow the state’s ap-
peal. On this issue, we are almost alone in the world in insisting
that an egregiously wrong acquittal cannot be appealed.

These three issues are, of course, a radically incomplete
sample of the dozens of issues that would benefit from a com-
parative law discussion. But they provide a flavor of Bradley’s
book as well as a window into the way the world’s criminal pro-
cedure may be moving toward a form of “globalization,” as a
recent book also suggests. 14

I. AN OVERVIEW

Bradley’s methodology facilitates comparisons among the
countries. He asked the authors of the individual chapters to
utilize an outline of criminal procedure based on the United
States model, thus “forcing” other systems into our model.
While this can produce awkward comparisons, and can obscure
genuine differences that might otherwise emerge, I think it on
balance beneficial. It highlights the often striking similarity in
the approaches of the various countries to criminal procedure
issues. At least in most areas, the sameness of the human expe-
rience overcomes any historic or formal distinctions, and we are
all much more the same than we are different.

14 CHRISTOPH SAFFERLING, TOWARDS AN INTERNATIONAL CRIMINAL PROCEDURE
Take police stops of vehicles as one example. Police naturally have an incentive to stop vehicles that are operating unsafely or that appear suspicious. What are the appropriate limits on when police can stop vehicles to determine whether there are grounds to issue a ticket or to arrest the occupants? One might adopt a rule, as has the United States, that vehicle stops implicate important constitutional rights and then create a series of exceptions that allow police to stop almost any car they want to stop. In the United States, police can stop a vehicle that is violating any of dozens of traffic laws and often discover evidence of a more serious crime in plain view; police can set up roadblocks to check for drunken drivers, and police can stop any car if they have reasonable suspicion to believe that the driver is committing or has committed a crime. If a police officer cannot find a legitimate basis to stop a car in that catalog of exceptions, he is not very creative.

In Argentina, by comparison, the relevant constitutional provision protects only dwellings, personal correspondence, and private documents. Police can thus stop any vehicle they wish because vehicles are not protected against arbitrary stops. In the United States, vehicles in theory are protected against arbitrary stops but police can stop (just about) any vehicle they wish because the Supreme Court has decided that vehicles deserve less protection than homes and private papers. What Argentina does openly by the way it articulates the relevant protection, the United States does indirectly by creating exceptions to the relevant protection. But we wind up pretty much in the same place. A police officer transported from Argentina to the United States would operate just the same though he would have to learn a new vocabulary to achieve the vehicle stops that he wanted.

The differences in the law of interrogation are too subtle to be adequately explored in one part of a short essay—I recommend Stephen Thaman’s new paper—but it is worth noting

19 Id. at 8.
20 Thaman, supra note 11.
that the country that gave us the voluntariness test has now rejected it in favor of a strict test of reliability. In England, a confession “is admissible only if the accused accepts, or the prosecution proves beyond reasonable doubt, that it was not obtained by oppression or in consequence of anything said or done which was likely to render the confession unreliable.”\(^{21}\) I suspect that this standard would result in suppression of more confessions than the *Miranda* prophylactic rule that is designed to protect the suspect’s right to remain silent.\(^{22}\)

Moreover, Italy seems to have outdone the United States in terms of rules protecting the individual’s right to remain silent. If the police are examining someone not yet a suspect, and he makes an incriminating statement, the police are required “to interrupt the individual and warn him that investigations may begin against him, and that he has a right to name a defense attorney.”\(^{23}\) Statements made prior to that time are inadmissible against the speaker. Once an individual becomes a suspect, he may be questioned as to identity, but police must warn the suspect of “his right to remain silent” as to other matters, must prepare a transcript of the questioning, must invite the suspect to name defense counsel or have defense counsel appointed, must notify the counsel of any scheduled questioning, and must not proceed unless counsel is present.\(^{24}\) According to Rachel VanCleave, nothing indicates “that a suspect may waive the right to have counsel present.”\(^{25}\) Moreover, statements taken in the absence of counsel “may not be used at trial except for purposes of impeachment.”\(^{26}\) This compendium of rules makes *Miranda*’s protections appear quite spare by comparison. Thaman agrees that Italy’s protection is broader than *Miranda*.\(^{27}\) And it is worthy of note that Russian courts have interpreted the Russian


\(^{22}\) For recent commentary on *Miranda*, see *supra* note 6.

\(^{23}\) Rachel VanCleave, *Italy*, in *Bradley*, *supra* note 6, at 263.

\(^{24}\) *Id.* at 263-64.

\(^{25}\) *Id.* at 264. This paragraph oversimplifies VanCleave’s discussion. The statement about suspects applies only to suspects who are not under arrest. The interrogation of suspects who are under arrest is governed by other rules, which depend on when the case is turned over to the prosecutor and the scheduling of a preliminary investigation by a judge. *Id.* at 265-66. When the case is turned over to the prosecutor, “police questioning may occur only upon delegation of this power to the police by the prosecutor.” *Id.* at 265.

\(^{26}\) *Id.* at 264.

\(^{27}\) Thaman, *supra* note 11, at 618.
Federation Constitution to require, prior to interrogation, a warning of the right against self-incrimination; the sanction for not providing the warnings is the suppression of the statements.  

Bradley’s book is filled with delicious discoveries in all areas of the law of criminal procedure. One of the many values of the book is that the chapters are heavily, almost obsessively, footnoted. A reader who wants to know more about the Argentine protection of dwellings, correspondence, and private documents, for example, has an easy trail to the original materials. A reader curious about the source of the exclusionary rule in Argentina has not only a cite to the relevant case but also, for context, a summary of the political events (harsh military rule) that preceded the case.  

Just to mention a few other gems: In South Africa, the Attorney General can authorize the arrest and detention of witnesses for interrogation in the interests of the administration of justice, but a confession can be excluded if the police make a threat or a promise during interrogation, an odd combination of expansive authority to question limited by concern about the effect of that questioning. The law of the Russian Federation regulates the use of undercover informants while the law of the United States does not. The Russian Constitution specifically provides, in two places, that “illegally obtained evidence is inadmissible in court,” while our Bill of Rights is maddeningly silent on this issue. Italy has an anti-racketeering law that seems, at least in part, modeled on the United States Racketeer Influenced and Corrupt Organizations Act. China has adopted the legality principle and the presumption of innocence.  

Sometimes the simplest observation can suggest profound differences in the mind set and methodology of different judi-
cial systems. Alejandro Carrio and Alejandro Garro report that the “Argentine legal system does not recognize the doctrine of stare decisis” but that “the rules and practices followed in the criminal process are shaped, to a certain extent, by interpretive standards issued from time to time by state and federal courts.”

I immediately wanted to know more about a system that explicitly rejects stare decisis but relies on “interpretive standards” issued by courts. I suspect, in practice, it is little different from our system that embraces stare decisis but with a tradition of judges seeking just results through “creative” use of the facts and precedents. To understand fully how the two systems treat interpretive precedents would be worth an article, if not a book, in itself.

Even my remarks on the three areas of focus for this essay will necessarily oversimplify. But I offer the reader an overview, based on the Bradley collection of essays, of how different legal systems deal with three problems in the administration of justice—police stops of citizens on the street, providing counsel to indigent defendants, and the appellate review of trial verdicts.

II. POLICE-CITIZEN ENCOUNTERS

Police-citizen encounters in the United States are largely regulated by what American criminal procedure scholars refer to as the Terry doctrine, a collection of doctrines and subdoctrines that began with the Court's decision in Terry v. Ohio.\(^3\) Much is packed into the deceptively simple phrase “Terry doctrine.” St. John's University Law School in 1998 hosted a two-day symposium exploring the history, doctrinal permutations, and future of the Terry doctrine.\(^9\) For my purposes in this essay, I focus on only one aspect of the doctrine—what must the police show to permit them to detain a person temporarily on the street and ask questions about his activities?

In Terry, the veteran police officer observed Terry and his companion make roughly a dozen trips back and forth past a store window, over perhaps fifteen minutes, often conferring with each other on a street corner, and sometimes conferring with a third man. The police officer suspected the men of “cas-

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\(^3\) Carrio & Garro, supra note 18, at 4.

\(^4\) 392 U.S. 1 (1968).

\(^5\) Terry v. Ohio 30 Years Later, supra note 2.
ing a job, a stick-up” and feared that they had a gun. The officer approached the three men in front of another store. The officer identified himself as a police officer and asked for their names. The men “mumbled something” in response, at which point the officer grabbed Terry and patted down the outside of his clothing. He felt and seized a revolver from Terry’s overcoat pocket. The United States Supreme Court said that while the officer lacked probable cause to arrest Terry of a crime, he did have reasonable suspicion to suspect that criminal activity might be about to occur. The Court held that this reasonable suspicion gave the officer grounds under the Fourth Amendment to seize the suspects and frisk them for weapons.

One aspect of Terry often escapes notice, at least until one reads Justice Harlan’s concurring opinion. The “stop” of Terry coincided with the frisk. There was no antecedent seizure of Terry because the act of a police officer approaching someone on the street is not itself a seizure. The police have a right, in common with everyone else “to address questions to other persons [and] ordinarily the person addressed has an equal right to ignore his interrogator and walk away.” Thus, the Fourth Amendment was not implicated until the officer physically seized Terry and frisked him. Had Terry made an incriminating statement, for example, prior to the officer grabbing him, it would have been admissible even if the officer lacked reasonable suspicion to seize Terry. Thus, when we ask whether the police can stop someone on the street, we need to distinguish between approaching and asking questions, which requires no justification under Terry, and having the authority to detain the person if he tries to leave, which requires particularized suspicion.

Moreover, what is required to justify a Terry detention should be distinguished from what is required to justify an arrest. Reasonable suspicion likely requires a lower probability than probable cause, though the Court has never achieved much precision with either standard. A clear distinction be-

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40 Terry, 392 U.S. at 6.
41 Id. at 7.
42 Id. at 15-16 & 28.
43 Id. at 28-30.
44 Id. at 31-34 (Harlan, J., concurring).
45 Id. at 32-33 (Harlan, J., concurring).
between the two standards, however, is that a Terry detention can be based on suspicion that “criminal activity may be afoot” without the officer having to specify what crime he suspects. An arrest, on the other hand, is the beginning of the criminal process against someone. A charging document must be filed, and it must contain the name of a particular crime. The most important way that Terry broadens police discretion, therefore, may be in permitting them to make detentions based on a generalized suspicion of criminal activity.

Hans Lensing contends in his overview chapter ending the book that “[m]ost systems do not have something identical or similar to” the United States rule about detentions on the street. Identical, no. Similar, I think yes. Two basic approaches exist, though some countries utilize both. One approach, typified by Terry, is to require police to have a level of individualized suspicion before they can detain and question a suspect. The second approach, followed generally in the civil law countries, is to permit police to detain anyone for purposes of ascertaining identity. During that process, of course, police can learn information that will lead to grounds for arrest and, in some countries, can search the individual looking for evidence of identification if the person fails to provide it. I begin with the approaches that require individualized suspicion.

The Ontario Court of Appeal held in 1993 that there is a common law right to detain a person as long as the officer has “an objectively determined articulable cause or reasonable suspicion of a crime,” a standard that is identical in its articulation to Terry’s standard. The power to frisk also apparently requires a Terry-like justification. If this accurately states the common law in all the provinces, Canada has a rule indistinguishable from Terry. In England, a police officer is permitted to stop and search if he has “reasonable grounds for suspecting that he will find stolen or prohibited articles, or an article which has a blade or is sharply pointed.” Searches on “reasonable grounds” to suspect are permitted for other specific items—including fire-

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46 Id. at 30.
47 Hans Lensing, General Comments, in BRADLEY, supra note *, at 426.
49 Id. at 55 (citing Simpson, [1993] 79 C.C.C. 3d at 482, and noting that it relied on Terry v. Ohio, 392 U.S. 1 (1968), when discussing the frisk issue).
50 Feldman, supra note 21, at 93.
arms, controlled drugs, and smuggled or dutiable items.\textsuperscript{51} This list is broader than the actual holding in \textit{Terry}, which was limited to detentions and frisks based on reasonable suspicion that the person was "armed and presently dangerous,"\textsuperscript{55} but \textit{Terry} has been expanded to crimes that do not necessarily imply that the person is armed and dangerous.\textsuperscript{53} So the scope of the British rule seems very similar to ours.

One might be tempted to say, as did Thomas Weigend, that "[t]here is no German counterpart to the American 'stop' as a brief detention on the street."\textsuperscript{54} But Weigend appropriately follows up this formalistic claim with a lengthy description of the right of German police to "take the measures necessary for establishing the identity of persons suspected of having committed a criminal offense (or even a mere administrative infraction)."\textsuperscript{55} He notes that "[s]uspicion" has been "defined very loosely in this context" to include even "insignificant and uncertain indications" of "involvement in criminal activity."\textsuperscript{56} Moreover, German police "routinely frisk anyone whom they believe to be armed in order to 'prevent commission of an offense.'\textsuperscript{57} German police do not have the \textit{Terry} vocabulary, but they have a right to detain and search that is virtually the same.

At least six other countries appear to follow a \textit{Terry}-like standard, though in each case it is unclear exactly how the probability standard compares to "reasonable suspicion." In Spain, police may frisk anyone "to identify and to arrest offenders involved in crimes causing 'public alarm' and to recover instruments, proceeds or evidence relating to such crimes."\textsuperscript{58} This seems similar to \textit{Terry}, but Richard Vogler reports that "[n]o distinct level of individual suspicion is required" and gives as an

\textsuperscript{51} Id. at 93-94.
\textsuperscript{52} 392 U.S. at 30.
\textsuperscript{53} The Court permits detentions in airports of individuals suspected of carrying drugs. See, e.g., Florida v. Royer, 460 U.S. 491 (1983); United States v. Mendenhall, 446 U.S. 544 (1980). Although the success of the hijackers on September 11, 2001, disclosed that airports are not as free of weapons as we had been led to believe, the Court in its airport cases does not mention the risk of the detained person being "armed and presently dangerous," thus suggesting that this factor is no longer important in the \textit{Terry} analysis.
\textsuperscript{54} Thomas Weigend, \textit{Germany, in Bradley, supra} note *, at 189.
\textsuperscript{55} Id.
\textsuperscript{56} Id.
\textsuperscript{57} Id. at 190.
\textsuperscript{58} Richard Vogler, \textit{Spain, in Bradley, supra} note *, at 376.
example of a legitimate frisk the search of anyone getting off a bus that had come from an area known for drug dealing. In Argentina, if the police have "strong indications of guilt" and there is "imminent danger of escape," a suspect can be detained "for the sole purpose of carrying the suspect before the judge who will decide on detention."

If Israeli police have reasonable suspicion to believe someone has committed a crime they can demand his name and address. Failure to provide that information is itself an arrestable crime. In France, police can demand identification from anyone "as to whom there is an indication that he . . . is preparing to commit a major felony [or misdemeanor]." Someone who is unable to furnish identity can be detained for up to four hours. In China, the law permits detention, not called arrest, without approval by prosecutor or judge, for three to seven days if the suspect "is preparing to commit a crime, is in the process of committing a crime, or is discovered immediately after committing a crime." It is unclear from the chapter what standard, if any, police must have to believe that these grounds are met. Another ground for lengthy detention is "strong suspicion that he is a person who goes from place to place committing crimes."

Another way of approaching the problem of suspicious persons on the street is to permit police to question them or demand identification without having to demonstrate any basis for suspicion. In Italy, any public official, including police, can demand identification of persons, and it is a misdemeanor to refuse to provide the information. Spain also permits police

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59 Id.
60 Carrio & Garro, supra note 18, at 7 n.20.
61 Eliaku Harnon & Alex Stein, Israel, in BRADLEY, supra note 5, at 219.
62 Id. at 220 (noting that the crime of which the person is suspected must be an arrestable crime before the failure to provide name and address can give grounds to arrest).
63 Richard S. Frase, France, in BRADLEY, supra note 5, at 151.
64 Id at 152. At least one state in this country, Texas, has created the offense of refusing to provide a correct name and address to a "peace officer who has lawfully stopped him and requested the information." Brown v. Texas, 443 U.S. 47, 49 n.1 (1979) (citing TEX. PENAL CODE ANN. § 38.02(a) (1974)).
65 Yue, supra note 36, at 82.
66 Id. at 83. There are five additional "categories of circumstances under which detention may be effected." Id. at 82-83.
67 VanCleave, supra note 23, at 247.
to demand proof of identity of any person. Those who fail to establish their identity can be taken to the police station. One ground for lengthy detention in China is when the suspect “does not reveal his true name and address or if his identity is unclear.”

Countries can, of course, combine this approach with the individualized suspicion approach of Terry. In Argentina, police can stop a person in a public place and put “a few questions to him or her” without “any level of suspicion.” Police can detain for up to ten hours anyone who does not establish his identity if they have “well-grounded reasons to presume that a person ha committed or may commit a criminal offense or minor infraction and such person fails to establish her personal identity.”

Under the Russian Administrative Offenses Code, “a person may be detained by law enforcement authorities for up to three hours for, among other things, the purpose of establishing identity or preventing administrative offenses.” Once the stop is made, the official “may conduct a protective frisk for weapons, a check on outstanding warrants, and/or a personal search.” Catherine Newcombe reports that, in practice, “sufficient grounds” are required to make the stop even though no standard is set out in the Code. If “sufficient grounds” requires individualized suspicion, the Russian approach also seems quite similar to Terry.

What this brief excursion into the worldwide law of detain and frisk has revealed, I believe, is that citizens of most countries want the police to make early interventions to prevent crime or arrest criminals as soon as possible but, at the same time, are fearful of too much police discretion. So even in Russia, a country without a long tradition of respecting individual rights, a practice has apparently grown up that limits the blanket discretion the Administrative Offenses Code seems to give officials to detain anyone for up to three hours. No similar evolution appears in the law of China. Precisely how the line be-

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66 Vogler, supra note 55, at 375.
69 Carrio & Garro, supra note 18, at 7.
70 Id. at 7-8.
71 Id.
72 Newcombe, supra note 28, at 288.
73 Id.
between "good" discretion and "bad" discretion is drawn seems to vary a little among the countries, but only a little. Countries that draw their traditions from England seem a little more skeptical of giving police broad discretion to detain people. Countries that have a history of problems with terrorists (Italy, Israel) seem to favor broader discretion. Countries committed to a civil law model with a, hopefully, benevolent government (France, Germany, Spain) also seem comfortable with broader discretion in officials to detain for a variety of reasons. Most of the countries permit detentions that last for hours, or longer, and include being taken to the police station. This is a broader limitation on liberty than Terry permits. Though there is no mechanical time limit on a Terry detention, the Court has invalidated detentions as short as half an hour and has insisted that the police have no authority under Terry to take the suspect to the police station.

But the overarching point to draw from this study is that the police in every country could have detained Terry and, probably, frisked him in the manner that the Cleveland police did, an exercise of police discretion that the United States Supreme Court upheld by a vote of eight to one. Chief Justice Earl Warren, the author of Miranda v. Arizona, wrote the Terry opinion that was also joined by liberal Justices Brennan and Marshall. It seems that, on the issue of giving police discretion to stop or solve crimes by briefly detaining suspects, the citizens of the world pretty much agree that the police should not be restricted too much. Justice Douglas, the lone dissenter in Terry, insisted that the Fourth Amendment to our Constitution contained only a single standard by which to judge whether the seizure of a person is permissible "probable cause" and, therefore, the Court should require that standard regardless of the nature or duration of the detention. But that approach was too restrictive for the other eight members of the Court and, so it seems, for the citizens of much of the rest of the world.

On this issue, the United States has moved closer to the other countries. Our historic fear of the central government directly led to the Bill of Rights and its high barriers against federal agents and prosecutors. During the debate on the Bill of Rights, for example, Patrick Henry said that the right to trial by

jury "prevents the hand of oppression from cutting you off. They may call any thing rebellion, and deprive you of a fair trial by an impartial jury of your neighbors." He concluded, "[a]s this government stands, I despise and abhor it." That visceral fear moderated during the nineteenth century and by today has largely been displaced by a fear of organized crime, drug traffickers, violent criminals, and terrorists. I doubt that Terry would have been decided the same way by the 1807 Supreme Court that ordered two of Aaron Burr's co-conspirators released from pre-trial confinement. Despite the introduction into evidence of a detailed letter implicating them in a conspiracy to raise an army and march on Baton Rouge, Chief Justice John Marshall wrote an opinion for the Court concluding that the government did not have probable cause. The fear of the strong central government pursuing its enemies is the only plausible way to understand this holding. Today we are more likely to be afraid of those who would conspire to overthrow our government.

III. PROVIDING COUNSEL FOR INDIGENT DEFENDANTS

Another important inflection point in the criminal process is the decision of whether to provide a lawyer for an accused who cannot afford one. The United States Supreme Court managed to avoid laying down any hard and fast rule in this country until 1963. Earlier cases left the matter largely in the discretion of the trial judge, who was to consider whether the failure to provide a lawyer amounted to a denial of "fundamental fairness" under the facts and circumstances of the individual case. In 1963, however, the Court unanimously held in Gideon v. Wainwright that the state must provide counsel to indigent defendants facing felony charges. Gideon asserted that a fair trial could not be held if "the poor man charged with crime has to face his accusers without a lawyer to assist him." Indeed, the Court even engaged in a superficial bit of comparative law in

77 Id.
78 See Ex parte Bollman, 8 U.S. (4 Cranch) 75 (1807).
79 See id. at 131-32.
82 Id. at 344.
Gideon, asserting that the "right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours." 83

The purpose of this part of the essay is to test the Court's assumption that other countries might treat more lightly the indigent's need for a lawyer. Under the more paternalistic umbrella of the civil law, it was certainly a reasonable hypothesis that lawyers might be viewed, in general, as less relevant to achieving a fair and accurate result. What we will discover is that the more extensive the role of the defense lawyer in testing the case—questioning defense witnesses and cross-examining prosecution witnesses—the more likely it is that counsel will only be provided when the stakes are high or when the defendant cannot receive a fair trial without the assistance of counsel. The scope of the role of defense counsel seems to be inversely related to the breadth of the provision of free counsel. When one is narrow, the other tends to be broad.

The role of the lawyer in the United States is broader than in any other country; lawyers are almost total alter egos who function as the defendant in investigating the facts, bargaining for a reduced charge or sentence, making motions, developing a strategy, picking a jury, deciding what witnesses to call and how to examine and cross-examine witnesses, arguing the case to the jury, and deciding dozens of questions involving appeal. Given this extreme breadth of function, it is perhaps not surprising that the Supreme Court has limited Gideon's scope. States may require proof of indigency and, so far, the Supreme Court has not set any standards for that determination. If a state assumed, for example, that a person with a job making twice the minimum wage is not indigent, that test would not violate any Supreme Court precedents but would likely exclude many defendants who realistically could not afford a lawyer to defend against a serious charge. Gideon also only applies if the defendant is sentenced to a jail term. 84 Thus, the judge can deny the request for counsel even when the accused faces a year in jail as long as the judge limits the penalties attending conviction to a fine, license revocation, and other non-incarceration sanctions. 85 In the United States, therefore, appointed counsel

83 Id.
enjoys an unlimited role and a broad, but not unlimited, coverage.

Argentina, by contrast, provides a broader right to counsel but one that has a narrower function. Counsel is paid for by the state without requiring proof of lack of resources: “The right to be represented by a public defender is not subject to the defendant’s proof of lack of financial resources.” Moreover, the right to counsel in Argentina exists regardless of the petty nature of the offense. The description of the role of the lawyer at the trial stage is sketchy, but it is not as extensive as in the United States. Prior to the 1993 reforms, “criminal proceedings at the federal level consisted of a succession of written motions and intermittent interlocutory decisions.” The lawyer’s role was presumably to prepare these documents and argue for particular outcomes in the interlocutory proceedings. The present model provides for a “concentrated and oral trial conducted by a panel of three judges.” But the “most relevant evidence is likely to have been collected before the trial” when the magistrate controls the investigation. The magistrate begins the investigation by questioning the defendant: “Neither the prosecutor or defense counsel is allowed to object to the questions posed by the magistrate, and they cannot pose questions to the defendant without the judge’s authorization . . . .” Moreover, the trial court is permitted to request evidence at trial on its own motion, and the prosecutor’s actions at trial are “not characterized by an adversarial zeal, but rather as those of a neutral decision maker.” The picture that emerges is of prosecution and defense lawyers who assist the judge in presenting the evidence, a far less central role than lawyers play in this country.

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88 Carrio & Garro, supra note 18, at 44.
87 Id.
86 Id. at 42.
85 Id.
84 Id.
83 Id. at 30-40.
82 Id. at 33.
81 Id. at 42.
80 Id. at 45.
In France, defendants have a right to appointed counsel when charged with any crime or misdemeanor, a broader rule than in the United States, but Frase reports that the “trial is primarily conducted by the presiding judge, and lawyers play relatively passive roles.” If Camus’s account in *The Stranger* is accurate, it is a passive role indeed. The narrator describes his lawyer as asking only a few questions. Most of the trial is conducted by the prosecutor and judge. France, then, is another example of a broad right to appointed counsel whose role is somewhat peripheral.

Trials in Italy were similar to those in France until a 1989 code revision “create[d] a more active role for the defense attorney with the use of examination and cross-examination of those giving statements to the court.” A 1990 Italian law “provides that the State will pay for the legal expenses of indigents [charged with felonies] whether the counsel is selected by the defendant or appointed by the court.” This is broader than under United States law, where the indigent defendant has no right at all to select his own lawyer, not even from among the public defenders who work in a particular office. The Italian rule is narrower in that it is limited to felonies. An indigent defendant in the United States cannot be incarcerated even for a misdemeanor, even for one day, unless he has been represented by counsel. Comparing Italy to France is useful. France has a far broader coverage (any offense that permits imprisonment versus only felonies) but a far narrower scope than Italy’s right to counsel. Once again, there seems to be a trade off between scope of function and breadth of coverage.

The role of counsel in Germany seems close to the French model, though Weigend makes no mention of a general right to appointed counsel. Indeed, he speaks of the prosecutor taking

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55 Frase, *supra* note 60, at 177 notes that defendants “have a right to appointed counsel in both Assize and Correctional Court.” Assize and Correctional Courts try crimes and “delicts” (misdemeanors). *See id.* at 169 & 144. “Delicts are punishable with a fine and/or a prison term” as well as lesser sanctions. *Id.*


57 Frase, *supra* note 60, at 177.


59 *Id.*

60 *See* Morris v. Slappy, 461 U.S. 1, 2 (1983) (overruling Court of Appeals decision that trial judge should have granted continuance to allow particular public defender to appear in court for defendant).
on the role of an advocate "[e]specially when the defendant is represented by counsel," implying that it is far from routine that defendants have lawyers. As in France, the presiding judge in Germany conducts the trial. He "determines the sequence in which proof is taken, is responsible for the completeness of the evidence, and interrogates the defendant, witnesses and expert witnesses." Nonetheless, the defendant and the defense lawyer "have the right to ask additional questions of witnesses" and to "demand that the court take additional evidence." The breadth of the right of indigent defendants to counsel is unclear from Weigend's account but the role is somewhere between that in France and that in Italy and the United States.

At the other end of the spectrum are countries where lawyers have long played a central, adversarial role designed to test the state's case. Most of these countries seem to follow the pre-\textit{Gideon} rule about the breadth of coverage, that counsel is required only when a defendant cannot otherwise receive a fair trial. In South Africa, for example, the trial is an adversarial proceeding where the prosecution has to rebut the presumption of innocence and prove guilt beyond a reasonable doubt. But South Africa requires a lawyer to be "assigned" by the state "at state expense" only "if substantial injustice would otherwise result."

England has an articulated test very much like the pre-1963 test in the United States. The judge must find appointment of counsel "desirable . . . in the interests of justice" by taking:

\ldots account of the seriousness of the consequences which the accused could face if convicted, the significance and complexity of any issues of law, the difficulties which are likely to be faced in investigating the case on his behalf, the ability of the defendant to represent himself, and the risk that a witness might be seriously distressed if forced to be cross-examined by the defendant in person.\footnote{Schwikkard & van der Merwe, \textit{supra} note 31, at 349.}

In a few categories of cases, counsel must be provided, but these seem likely to be quite limited in terms of the numbers of

\footnotetext[101]{Weigend, \textit{supra} note 51, at 209.}
\footnotetext[102]{\textit{Id.} (parentheticals giving citations omitted).}
\footnotetext[103]{\textit{Id.} (noting that the trial court can deny the motion to take additional evidence if it "is obviously redundant or irrelevant").}
\footnotetext[104]{Feldman, \textit{supra} note 21, at 125.}
defendants.\textsuperscript{107} England is, of course, the mother of the common law method and trials are fully adversarial, with the prosecution required to establish all elements of the crime beyond a reasonable doubt.\textsuperscript{108}

Despite being a civil law country, Spain seems to follow England on this point. Spain has a state legal aid system that, according to Richard Vogler, works "the same way as in the U.K."\textsuperscript{109} As we just saw, judges in the U.K. must find appointment of counsel "desirable . . . in the interests of justice."\textsuperscript{110} If this is also true in Spain, the system resembles the pre-1963 system in the United States. Vogler does not describe the role of defense lawyers in Spanish courts, though the lawyers that appear in court on behalf of defendants are called "advocates," which might suggest that they play more of an adversarial role than in France. That is borne out by Vogler's description of the role of prosecutors. Though prosecutors are formally charged with ensuring that the rights of the suspect and victim are protected equally, they are increasingly "being required to adopt a more adversarial role."\textsuperscript{111} Vogler's description, in sum, suggests a movement in Spain away from the French model, where the lawyers are largely passive, and toward the new Italian model, which has adopted at least some of the common law adversarial nature.

The Canadian approach is somewhat murky. There is no clear right to the appointment of a lawyer when the accused cannot afford one, but Kent Roach suggests that section 7 of the Canadian Charter of Rights and Freedom "may be violated "if the accused cannot have a fair trial without legal assistance."\textsuperscript{112} Roach asserts that as "a matter of practice, legal aid is available to accused who cannot afford a lawyer where there is a likelihood of imprisonment and sometimes where there is a likelihood of loss of livelihood."\textsuperscript{113} It would seem, then, that Canada has allowed practice to fill a gap left by a vague doctrine, resulting in a breadth of coverage greater than in the United States.

\textsuperscript{107} Id. One category is murder. Id. The other two are mysterious procedural categories that do not correspond to the American model. See Id.

\textsuperscript{108} Id. at 122.

\textsuperscript{109} Vogler, supra note 55, at 371.

\textsuperscript{110} Feldman, supra note 21, at 125.

\textsuperscript{111} Vogler, supra note 55, at 371.

\textsuperscript{112} Roach, supra note 45, at 76.

\textsuperscript{113} Id. at 75.
The role of the lawyers in testing the case before the court is the same as in England and the United States.\(^\text{114}\)

Then there are the countries whose formal doctrine purports to guarantee counsel in all cases but who simply lack the resources to implement that noble ideal. The Russian Constitution guarantees the right to have counsel appointed, but Newcombe reports that “securing a lawyer” is “often problematic,” in large part because the state paid fees are so low.\(^\text{115}\) She attributes to a Moscow City Court judge the view that “attorneys assigned to [indigent defendant] cases frequently delay hearings in these matters in order to attend the proceedings of their well-paying clients.”\(^\text{116}\) China is an even more extreme example of this category. According to Liling Yue, “Constitutional and criminal procedure law protects the defendant’s right to have counsel. However, due to the Chinese economic situation, it is impossible to appoint a lawyer for every defendant who is indigent,” though judges “may appoint a lawyer if they consider it is necessary.”\(^\text{117}\)

According to a news account in the *New York Times*, the adversarial role of defense counsel is not uniformly accepted by judges and prosecutors in China even when the defendant can secure a lawyer.\(^\text{118}\) In the case covered by the *Times*, Liu Jian, a young lawyer from a firm in Nanjing, was sent to the small town of Binhai to represent a defendant charged with taking bribes. He did what American lawyers (and lawyers at his firm) did when representing clients: he examined documents, consulted with his client, interviewed witnesses, and called witnesses to testify. But when the court convened on July 13, 1998, almost none of the thirty-seven defense witnesses appeared to testify.

The prosecutor swore and ranted at Mr. Liu, calling him a criminal. And at trial’s end, outside Binhai’s courthouse, Mr. Liu found himself in police custody, charged with “illegally obtaining evidence.” Mr. Liu spent a nightmarish five months in detention, subjected at times to beatings and daylong interrogations without food or rest.\(^\text{119}\) He was not permitted to speak to

\(^{114}\) Id. at 74.
\(^{115}\) Newcombe, supra note 28, at 311-12.
\(^{116}\) Id. at 312.
\(^{117}\) Yue, supra note 36, at 88.
\(^{119}\) Id.
his wife during the entire time in detention. Though legal experts from Nanjing and Beijing "rallied to his defense" and declared his innocence, Liu ultimately decided to plead guilty in exchange for a sentence of time served.

His "crime" of illegally obtaining evidence was to ask leading questions of the witnesses he questioned prior to trial and to interview the witnesses alone—the practice in China, it seems, is for two lawyers to be present during the pre-trial questioning. But the real "crime" seems to have been his zealous advocacy on behalf of someone the prosecutor and judge thought guilty. Professor Li of the University of Politics and Law said, "In certain cases, when law enforcement bodies don't have a highly developed legal mentality, they assume lawyers doing their professional work are doing the bidding of villains."1 If this account is representative of how courts function in substantial parts of China, the role of the right to counsel is quite narrow in practice and, because of economic conditions, also narrow in the breadth of coverage.

Beyond the issue of the formal appointment of counsel is the issue of how to measure when counsel is not performing effectively. Perhaps unsurprisingly, there seems to be little law in other countries on the issue of the effective assistance of counsel, unlike in the United States where the issue has been the subject of thousands of appeals.2 Though this huge body of case law has generated a lot of heat in the United States, it has not generated much light. In the first case to define ineffective assistance, Strickland v. Washington,3 the Court created a two-part test for when assistance violates the Sixth Amendment: first, that the lawyer provided "deficient" representation and, second, that the deficient representation prejudiced the client's case. The prejudice test, though difficult to meet, at least can be stated in a way that gives courts guidance in applying it. The criminal client must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."4

1 Id.
2 A Westlaw search conducted in April 1997 for the name of the seminal Supreme Court opinion on ineffective assistance of counsel produced over 20,000 entries.
3 466 U.S. 668 (1986).
4 Id. at 694.
As to "deficient" performance, the Court offered a circular definition: "[T]he defendant must show that counsel's performance was deficient. This requires showing that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Remarkably, the Court offered only the following as a way out of the circularity it created: the "defendant must show that counsel's representation fell below an objective standard of reasonableness." Undoubtedly sensing the inadequacy of this definition, the Court defensively instructs the reader, "More specific guidelines are not appropriate."

The Court then adopted a presumption that renders guidelines largely unnecessary. Concerned about the "distorting effects of hindsight," the Court concluded, "Judicial scrutiny of counsel's performance must be highly deferential." More to the point: "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' And the presumption is, in the Court's words, a "strong" one: "counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." In sum, the Court created a procedural mechanism by which tens of thousands of defendants can challenge the effectiveness of the lawyer who represented them but, at the same time, set a standard of review that practically guarantees rejection of any claim short of gross incompetence. In Strickland itself, the Court by a vote of eight to one found the lawyer's performance at the death sentencing hearing adequate even though he failed to investigate a plausible claim that the murders were committed under extreme emotional disturbance and did not present any evidence at all during the sentencing hearing.

This issue might not arise in civil law countries. The formal nature of the trial and (at least until recently) the relatively pas-
sive role of defense counsel both before and during trial would suggest that the question of effective representation might not even appear on the radar screen of lawyers and judges. The physical presence of a lawyer representing the defendant might satisfy the civil law because the right to counsel is not so central in the first place. Indeed, I found no mention of effective assistance of counsel in the chapters on Argentina, France, Germany, Italy, and Spain. Nor was the issue mentioned in the two countries with the least-developed legal infrastructure—China and Russia.

As we will see in the next part, there is another procedural reason why ineffective assistance of counsel is not very important in most countries. The nature of appeal is radically different in most other countries. The norm for criminal appeals is that the appellate courts correct all errors, usually after a rehearing, rather than remand for a new trial. The availability of at least a partial rehearing and a corrective mechanism at the appellate level, of course, means that “[i]ncompetent representation in a [lower] court may be remedied by competent representation by way of rehearing to the [higher court].”150

Even in England, ineffective assistance of counsel is generally “not in itself a ground of appeal.”151 An inquiry into the effectiveness of counsel is clearly permitted in only two countries represented in Bradley’s book, Canada and Israel. The Canadian approach is very similar to ours. It requires that the legal advice “be negligent and result in a reasonable probability of a miscarriage of justice.”152 This seems very close to the Strickland standard that requires a showing of both “deficient performance” and “prejudice” to the defendant’s case. Roach cites two cases where the Canadian courts found ineffective assistance. Both parallel United States Supreme Court cases. One held the representation of co-defendants was ineffective when they might be able to place the blame on each other.153 The other held that the failure to look for and question witnesses who might support the defendant’s alibi is ineffective assistance of counsel.154

150 Feldman, supra note 21, at 136-37
151 Id. at 136.
152 Roach, supra note 45, at 77.
The Canadian requirement that the defendant show a reasonable probability of a "miscarriage of justice" might be harder to meet than the Court's definition of prejudice to the defendant's case, though both standards are difficult enough to meet. The Israeli standard is similar to Canada's. It requires proof not just of prejudice but also requires "evident" proof of a possible miscarriage of justice—i.e., evident proof of "the risk of wrongful conviction."  

The only case raising ineffective assistance in South Africa avoided it by finding waiver. The defendant had "fail[ed] to take any steps to terminate his counsel's mandate and also expressed no dissatisfaction with the [lawyer's] conduct of the case." P. J. Schwikkard and S. E. van der Merwe express the view, perhaps based on the way the court avoided the issue in this case, that the right to counsel will include the right to effective assistance of counsel when the right case is presented to the courts. Time will tell.

This brief tour of the right to counsel law suggests that the Court was largely right in Gideon v. Wainwright when it suggested that defense counsel "may not be deemed fundamental and essential to due process in other countries." The more fundamental the role for counsel, the less broadly counsel is provided to indigent defendants who can obtain a fair trial without counsel. The reason counsel is generally more limited in other countries has nothing to do with a lack of concern with fairness or accuracy but, rather, manifests the trust that other countries have (or, perhaps, had) in systems where the prosecutor owed duties to the defendant, the judge's role was to find the facts as accurately as possible, and the case can be at least partially re-heard, and errors of counsel corrected, on appeal.

While this model is different from the modern common law model, the English approach for centuries was more like the civil law model. From the eleventh to the nineteenth century in England, limitations were placed on the right of defendants to have counsel when defending a felony charge. By the seventeenth century, there was an absolute bar on counsel in felony

155 Harnon & Stein, supra note 58, at 243.
156 Schwikkard & van der Merve, supra note 31, at 354 (citing S v. Bennett, 1994 (1) SACR 391 (CC)).
157 Id.
cases. Sir Walter Raleigh had to conduct his own defense against treason while the king was represented by Attorney General Edward Coke and at least two other counsel. Writing a half century later in his Institutes, Sir Edward Coke sought to justify the no-counsel rule on the ground that serious felony indictments should not be brought, or maintained, unless "the evidence to convict a prisoner [is] so manifest as it could not be contradicted." If a felony charge was brought without manifest evidence, it was the judge's duty to dismiss it, much as the civil law countries today envision the judge's role. Blackstone rejected Coke's dictum as both perverse and little short of ridiculous, and by the nineteenth century, Parliament had changed the rule by statute. After that, English law recognized the necessity of counsel, at least when "desirable . . . in the interests of justice."

The civil law countries may be seeing a similar evolution in the attitude toward counsel. Several of the writers in Bradley's book commented that the civil law view that defense counsel is unnecessary has been changing, as part of a general movement toward a more adversarial model. Italy's 1989 Code of Criminal Procedure was a "dramatic[] move[] away from its historically inquisitorial system of criminal justice to a system infused with adversarial elements." Craig Bradley in his introduction suggests that the civil law countries are becoming more heterogeneous, making the notion that prosecutors and judges can adequately represent defendants of different races or nationalities more difficult to accept today. The full explanation is likely to be more complicated, including, perhaps, a loss of faith in the government as ultimate provider of our health and happiness (a view that has long been less prevalent in the United States than in some of the European countries). After all, the long flirtation with socialism in Italy, Spain, France, and even to some extent in England, suggests a belief that the government will take care of citizens. That flirtation seems, for now, to be cooling.

159 2 HOWELL'S STATE TRIALS 1 (1603).
160 3 Coke's INSTITUTES * 137.
161 4 W. BLACKSTONE'S COMMENTARIES * 355 (citing 3 Howell's State Trials 726).
162 6 & 7 W. 4, c. 114, s. 1 (1836).
163 Feldman, supra note 21, at 125.
164 VanCleave, supra note 23, at 245.
165 CRAIG M. BRADLEY, INTRODUCTION, IN BRADLEY, supra note *, at xxi.
Of course, the reasons why the civil law countries are creating a role for lawyers that is closer to the Anglo-American model are ultimately unknowable, and the ones I offer are based on pure speculation. What we can conclude with a reasonable degree of certainty is that the models for determining guilt and innocence are not as far apart as they were in 1963 when the Court decided *Gideon*. Though most of that movement has been the civil systems moving closer to the common law, at least some movement has been in the other direction. The Court's decision to permit juries of six and non-unanimous juries of twelve, as well as to permit convictions of petty offenses with no juries at all, are small steps toward a civil law model that puts less emphasis on juries. In addition, recent efforts to involve victims in the process move us, however slightly, in the direction of the civil law model. Still, it is fair to conclude that the differences between the civil model and the common law model remain greater in the context of the right to counsel than in the context of the authority of police to stop citizens and inquire about their identity or ask for an explanation of their presence in a particular place. This suggests that attitudes in the various countries about the usefulness of police intervention to stop or solve crimes is more uniform than the attitudes about the best way to determine the fact of guilt or innocence. I suspect that this is a common sense observation. People everywhere fear crime and the political majorities that control the legislatures see police as useful in protecting against crime. But how best to determine whether the defendant did X or is guilty of crime Y is more a function of one's confidence in the accuracy and fairness of the complete police investigation (not just the original intervention) and of the fairness of prosecutors and judges. The worldwide view seems to be somewhat non-uniform on these issues.

IV. REVIEW OF VERDICTS AND PROSECUTION APPEAL

Over a biting dissent by Justice Oliver Wendell Holmes, the Supreme Court held in 1904 that the Double Jeopardy Clause

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149 For a defense of a constitutional amendment to protect victims' rights, see Cassell, *supra* note 4.
bars an appeal of a federal acquittal. In 1937, Justice Benjamin Cardozo, writing for eight members of the Court in *Palko v. Connecticut*, held that states were permitted to appeal, in certain situations, acquittals based on errors of law made by the judge. The technical distinction between the cases was that in 1937 the Double Jeopardy Clause did not apply to the states and the *Palko* Court was interpreting the Due Process Clause, which in the Court's view provided more latitude for prosecution appeals than the Double Jeopardy Clause. When the Court in 1969 held that the Double Jeopardy Clause is part of the Due Process Clause, everyone assumed that prosecution appeals of acquittals were then forbidden to states as well as the federal government, though the Court has never squarely held this to be true.

Why should a criminal justice system forbid prosecution appeals? One might assert finality as a value but finality would suggest forbidding all appeals, not just appeals by the state. As long as the defendant can appeal but not the prosecution, which is the system in the United States today, some value other than finality must be informing the system. That value seems to be a fear that the government will otherwise be able to wear down innocent defendants by appealing, retrying, and appealing until a jury convicts or an exhausted and impoverished defendant accepts a plea bargain. Another value served by the United States rule is to protect the jury's ability to nullify the charge and acquit in the face of the evidence. This value is more controversial than the one seeking to protect factually innocent defendants. But to achieve the latter rationale would not require an absolute bar on prosecution appeals, as we shall see.

Consider the strongest case for a prosecution appeal. The trial judge makes an egregious error—a provably bad reading of the Fourth Amendment, for example—and grants the defendant's motion to suppress damning evidence of guilt. The state procedure does not permit interlocutory appeals. The defendant, now sure of victory, spurns the prosecution's plea bargain

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151 302 U.S. 319, 328 (1937).
offers, and is acquitted. Would it shake the foundations of justice to permit the presiding judge to grant the state an appeal of the decision to suppress the state’s evidence? The 1937 Connecticut statute considered in *Palko* authorized that kind of process. If the state wins the appeal, there would, to be sure, have to be a new trial and this offends the notion of finality. But as finality is always denied the state when the defendant wishes to appeal, perhaps we might be willing sometimes to deny finality to defendants if we could protect innocent defendants.

In a case where, through no fault of its own, the state is denied the use of clear evidence of guilt, one could plausibly conclude that Holmes and Cardozo are right—that the state should enjoy a limited right to appeal. In Cardozo’s words, to permit the state a partial reciprocal right to appeal for errors of law is “no seismic innovation. The edifice of justice stands, its symmetry, to many, greater than before.” Yet the United States Supreme Court currently forbids an appeal, at least in federal cases, even if the judge’s ruling was obviously wrong and deprived the government of evidence needed for conviction.

We can test the extent to which Holmes and Cardozo might be right, and the current Court wrong, by considering how other countries deal with the issue of prosecution appeals. This requires an inquiry into how other countries review criminal verdicts. My own focus on the United States system is demonstrated by my surprise in learning that most other countries, at least those surveyed in Bradley’s book, use appellate review to conduct a thorough inquiry into the facts and law underlying the trial verdict. Having made its own independent inquiry into the case, the appellate court will either affirm the trial court or substitute its own judgment for that of the trial court, subject to various kinds of appeals to higher courts that provide the sort of formal review all our appellate courts provide. Remands for new trials are rare in most countries, therefore, whether the original verdict was a conviction or an acquittal. The end of the appellate process is almost always the end of the case.

This system puts a premium on finality, on getting it right the first time, rather than sending a case back to be retried if

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154 This is the conclusion I reach in my book on double jeopardy. *See id.* at 270-71.
155 *Palko*, 302 U.S. at 328.
harmful errors are found. It gives great weight to the value of finality and also reduces the deleterious effect on the acquitted defendant. France has a complex version of this model. The crimes that would be the most serious American felonies are tried in the Assize courts. Appeals from this court are limited to issues of law and an acquittal cannot be overturned—the only example of this American rule that I found in Bradley's book. Other offenses, the majority of all crimes, are treated differently. Most offenses that would be American felonies and many misdemeanors are tried in the Correctional Court. Final decisions of the Correctional Court as to guilt, innocence, dismissal, or sentence may be appealed by the accused, the prosecuting attorney, the attorney general for that appellate district, and certain administrative authorities. Some offenses that would be misdemeanors in the United States, as well as public order, regulatory, and traffic offenses, are tried in Police Court. The appeal from Police Court is similar to that from Correctional Court, though limited to more serious judgments (for example, the suspension of a driver's license or a fine over a certain amount).

Appeals from both the Correctional and Police Court produce an "appeal hearing [that] is, in principle, a trial de novo on all issues of fact, law, or sentencing raised by the appeal." The decision of the Court of Appeals supplants that of the trial court, making a retrial unnecessary, though the decision of the Court of Appeals can itself be appealed to the Court of Cassation. The Court of Appeals has the authority to reverse the conviction and enter an acquittal, an outcome that on average has occurred in about twelve percent of the cases appealed. Though Frase does not explicitly mention the right of an appellate court to enter a conviction in place of an acquittal, it is im-

157 Frase, supra note 60, at 144.
158 Id at 178, 180.
159 Id. at 144.
160 Id at 144.
161 Id. at 178.
162 Id. at 144.
163 Id. at 178-79
164 Id. at 179.
165 Id. at 179-80.
166 Id. at 179.
explicit in his statement that the prosecution can appeal a final decision as to innocence.\footnote{\textit{id.} at 178.}

But, as noted, appeals of the most serious crimes are limited to convictions. Why the French Code would want to protect acquittals of the most serious felonies, but not other offenses, is not clear. One could structure a system with precisely the opposite bias—protecting acquittals of less serious crimes and permitting trials de novo in the Court of Appeals for acquittals of the most serious crimes. The rationales for this hypothetical system are efficiency and protecting the public from dangerous criminals. Trials de novo in the Court of Appeals could, on efficiency grounds, plausibly be limited to cases where the effect of a mistake is greatest, both for the defendant and the public. Because the Court of Appeals consists of three judges who review the trial court decision and have the authority to hear witnesses, no reason exists to think that it would render verdicts that are less accurate than the trial court. Indeed, the availability of review de novo in the Court of Appeals for almost all verdicts suggests that the French view its decisions as more likely to be accurate.

Perhaps the idea behind the French system is that the accused has so much at stake when charged with a serious felony that a prosecution appeal de novo in the Court of Appeals is simply too burdensome. That seems an odd judgment given the gravity of these crimes. The point for the essay, however, is that with the exception of the most serious felonies, acquittals in France can be appealed and heard de novo, and reversed, in the Court of Appeals.

Germany has a similar, though simpler, model.\footnote{\textit{Weigend, supra} note 51, at 212.} A general appeal can be initiated by either the prosecutor or defendant by filing a one-sentence letter. A three-judge panel then holds a new trial as to guilt as well as sentence. The panel must begin again and take new evidence. If it upholds the original verdict and sentence, it dismisses the appeal. Otherwise, the appeals court substitutes its own judgment for that of the trial court. Italy’s system is similar.\footnote{\textit{VanCleave, supra} note 23, at 280-81.} In China, both the prosecutor and defendant can appeal. No mention is made of remand and it appears that the appellate court simply substitutes its judgment.
for that of the lower court. The law apparently permits the appellate court to rehear the case or simply to "review the case by reading the file, interrogating the defendant and interviewing the defense counsel if the facts of the case are unclear."\textsuperscript{169}

Israel permits appeals of convictions and acquittals but severely limits the possibility of a new trial. Though Eliahu Harnon and Alex Stein do not say so explicitly, it seems that the function of the appellate court is similar to that in France and Germany: it can substitute its own judgment for the conviction or the acquittal. A new trial following a conviction is permitted only in "extraordinary circumstances" and never following an acquittal.\textsuperscript{7} "Unlike an ordinary prosecutorial appeal, [a new trial following acquittal] would violate the defendant's right against double jeopardy."\textsuperscript{171} The net effect of the Israeli system, then, seems to be that of the French-German model. The process almost always ends with the appellate court judgment.

Spain and Russia have systems that are a sort of hybrid between the French-German model and that in the United States. In Spain, either party can appeal on the grounds of errors of law and procedure.\textsuperscript{172} The Supreme Court can either reject the appeal, remand to the trial court with orders to remedy the mistake and begin again at the point at which the error was made, or give a new judgment itself that corrects the error. Spain thus contemplates retrials of acquittals when the Supreme Court finds the verdict infected with errors of law, which was the essence of the Connecticut statute reviewed in \textit{Palw}. Russian criminal procedure permits appeal in jury trial cases only of legal errors and omissions. Acquittals can be appealed, though "[s]ome claim" that the "right to appeal acquittals offends the [Russian Federation] Constitution's prohibition against double jeopardy."\textsuperscript{173} The Russian procedure, like the Spanish, gives the appeals court flexibility to remand for retrial or enter an order affirming or modifying the original decision (including an outright dismissal of the case).\textsuperscript{174}

\begin{footnotes}
\textsuperscript{169} Yue, \textit{supra} note 36, at 89.
\textsuperscript{170} Harnon \& Stein, \textit{supra} note 58, at 236.
\textsuperscript{171} Id.
\textsuperscript{172} Vogler, \textit{supra} note 55, at 392-93.
\textsuperscript{173} Newcombe, \textit{supra} note 28, at 316.
\textsuperscript{174} Id.
\end{footnotes}
Canada and Argentina have the model envisioned by Justice Holmes in his dissent in 1904, and embraced by the *Palko* Court, based on the concept of continuing jeopardy. The commonsense idea here is that the defendant’s jeopardy is not ended even by acquittal if the verdict is tainted by legal errors. Defendants are protected to a large extent under the Canadian continuing jeopardy model because the prosecutor cannot appeal the facts. Similarly, the Argentina chapter notes that appeals are limited to errors of law and that thousands of cases are reversed on appeal “and in favor of all parties to the proceedings.” For example, the prosecution can appeal sentences and the appellate court can enter a more severe sentence. No specific mention is made of appealing a verdict of acquittal but that is certainly implied in the “all parties” description of who may appeal. Unless the trial judge in Canada or Argentina makes an error of law sufficient to cast doubt on the verdict, an acquittal thus ends the defendant’s jeopardy. But not in every case. Not when the judge erroneously suppresses some of the state’s evidence and thus causes an unjust acquittal. That is *Palko*.

In England, the less frequent form of appeal is from the magistrates’ court to the High Court. Both convictions and acquittals can be appealed to the High Court on the ground that the verdict “was either wrong in law or in excess of jurisdiction.” David Feldman comments that such appeals are rare; only 166 occurred in 1996 as compared to 19,000 appeals from the magistrates’ court to the Crown Court. The prosecutor is not permitted to appeal to the Crown Court. That the prosecutor rarely resorts to the appeal to the High Court, of course, does not diminish the point that the prosecutor can appeal any acquittal on the ground that it was “wrong in law.” That option is not available in the United States.

South Africa’s system seems the closest analog to ours, though remands are more limited. A defendant’s successful appeal of a conviction generally removes the bar to a second

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177 Carrio & Garro, *supra* note 18, at 50.
178 Feldman, *supra* note 21, at 134.
179 *Id.*
180 *Id.* at 133, 134.
181 *Id.* at 133.
trial in the United States. In South Africa, retrials following successful appeals of convictions are permitted only when the trial court lacked jurisdiction, the indictment was invalid, or there was another technical defect in the procedure. Double jeopardy principles prevent other retrials. Moreover, the prosecution cannot appeal “against an acquittal on the facts.” No mention is made of acquittals produced by legal error but if no retrial is permitted following the defendant’s successful appeal of a conviction, it would be bizarre to permit the prosecutor to obtain a retrial by appealing an acquittal secured on any ground. A South African defendant who wins an acquittal on the facts at trial or wins an appeal on any ground is thus forever free of those criminal charges. South Africa’s system provides more finality than ours and is even more strongly tilted toward the defendant.

Whatever the differences in the mechanism, all the jurisdictions covered in the book, with the exception of the United States and South Africa, sometimes permit the prosecutor to appeal an acquittal. Finality is for the most part a two-way street. Both the prosecutor and defendant can generally appeal, and the appellate court will affirm or modify the trial judgment, thus ending the case. This process provides substantially more finality than we have in our system, which almost always requires a remand for a retrial when an appellate court finds a non-harmless error infecting a conviction. Innocent defendants are protected in the United States by forbidding all prosecution appeal. Innocent defendants are protected in other countries by some combination of a less adversarial prosecutor, who is less likely to appeal, and the thoroughness of the appellate review.

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182 United States v. Tateo, 377 U.S. 463, 468 (1964). The only exception is when the basis for the appellate reversal is insufficiency of evidence, a judgment that is the functional equivalent of an acquittal entered by the appellate court. See Burks v. United States, 437 U.S. 1 (1978).

183 Schwikkard & van der Merve, supra note 31, at 356.

184 Id. at 357. This sentence also refers to the prosecution’s “right to appeal against a court’s decision on law or a court’s decision to release an accused on bail.” Id. Given the antipathy toward retrials, and the lack of mention of appellate courts modifying judgments, the right to appeal on grounds of law seems likely to be limited to review of sentences or to interlocutory appeals. The next sentence indeed refers to appealing decisions to exclude evidence from which, presumably, an interlocutory appeal would lie.

185 See supra note 176.
That so many countries permit prosecution appeal in some contexts does not necessarily mean that Holmes and Cardozo are right. But it does suggest that we should not lightly disregard the argument made in *Palko*. A prosecution appeal limited to mistakes of law made by the trial judge that cost the state evidence of guilt does not shake the edifice of justice. As I noted earlier, the Court has never ruled directly on this issue since *Palko*. Perhaps the experience of other countries provides hope that if the Supreme Court ever faces this issue squarely, it will carefully consider the views of Holmes and Cardozo. Perhaps the Court might even look to other countries for guidance.

More significantly, perhaps our legislatures should consider some variation of the French-German model for the appellate process. Though having appellate panels retry, partly or fully, cases on appeal would involve much more time and energy at the appellate level, it would save enormous amounts of time now spent in retrying cases to juries. Moreover, the outcomes would likely be more accurate than under our present system. A panel of appellate judges should be better equipped than juries to separate innocent defendants from those who are guilty. And this system largely solves the problem of ineffective assistance of counsel that bedevils the United States system. Incompetent trial counsel's mistakes can be corrected by counsel at the appellate level. Presumably, appellate counsel will be more competent and, in any event, a panel of appellate judges would compensate for obvious defense counsel error. It is a system worth considering.

V. CONCLUSION

My brief study of aspects of comparative criminal procedure, drawing from Bradley's book, is more evocative than conclusive. My purpose was to help the reader have fun thinking about different approaches to difficult criminal procedure issues and, in the process, to show that the Bradley book is a useful research tool. I hope I succeeded in both goals.

But this study has drawn some tentative conclusions. The civil law and common law systems of criminal justice have been slowly moving toward each other. We are actually quite close when the issue is the authority of police to detain and question suspicious individuals. We are somewhat farther apart in the way we provide counsel to indigent defendants and even farther apart in the way criminal verdicts are reviewed on appeal. Be-
cause the appellate systems are so different, we are poles apart on the issue of whether the prosecutor can appeal an acquittal. On this issue, we seem to have South Africa as our only ally.

Given the current dissatisfaction with the United States system, perhaps Bradley's book will stir suggestions for improvement. I recommend, tentatively, two aspects of the systems surveyed in this essay—adopting the thorough appellate review of criminal verdicts and, as a corollary, permitting prosecution appeal based on errors of law. Others will surely come up with additional ideas after a study of Bradley's excellent book.